

30-Year Rule Review
Response by the Keeper of the Records of Scotland

The Review asked for particular responses on the following points:-

1. Whether, in the Freedom of Information era, 30 years remains the point by which government records should normally be made available to the public.
2. Benefits and risks of any change.
3. Options for planning and implementing a transition to any new arrangements.

Background:

- Review and arrangements for the transfer of government records to The National Archives of Scotland (NAS) differs from practice in the rest of the United Kingdom. Public records are transferred to the custody of the Keeper of the Records of Scotland under the Public Records (Scotland) Act, 1937.
- The 1958 Public Record Act exempts from its terms records of government bodies that are mainly concerned with Scottish affairs. In consequence therefore, the “30 Year rule” has never applied to Scottish public records. Until 2005, Scottish Ministers adopted the 30 year closure period by administrative action, ensuring that release of public records from government files was in line with practice elsewhere in the UK.
- In Scotland, transfer of the majority of government records to the NAS takes place before the expiry of 30 years. Scottish Government (SG) files can be transmitted into the Keeper’s custody either after the First (5 years) or Second (25 years) review processes have been completed. This has resulted in NAS accepting government files often well in advance of the traditional 30 year open period.

Records Management Issues:

- The impact of any proposed reduction of closure to a period less than 30 years upon the existing records management and transfer process would not seriously affect Scottish practice.
- The adoption of an electronic document and records management (eDRM) system by all SG departments in 2006, means that a finite number of paper files exist. The majority of these already form part of the annual review system.

- On average SG departments review over 100,000 files per annum, with approximately 1% passing to the NAS for permanent preservation. In NAS's view, a reduction of the traditional 30 year 'closure' period would not significantly affect the number of paper files being reviewed annually, with little increase in the numbers transferred to the NAS.
- Transfer of electronic files from the eDRM system will be made sooner than the historical "30 Year rule" period by mutual agreement between the SG and NAS. This furthers the argument for review of the older 'closure'.

Freedom of Information Implications

- The most significant legislative change affecting public access to government information in Scotland was the implementation of The Freedom of Information (Scotland) Act 2002 (FOISA) on 1 January 2005. The Act introduced an assumption of openness and enabled the public to have access to information held on any government file, or a record held on behalf of a named Scottish public authority. More than any other Act therefore, FOISA has radically changed the notion of keeping records 'closed' for 30 years.
- Certain restrictions continue to apply to records held by the NAS concerning reserved matters, which remained the preserve of UK government departments. Any such applications to view 'closed' records are dealt with by the Scotland Office under the UK Freedom of Information Act, 2000.
- Under both FOI Acts, records are deemed to become 'historical' after 30 years when exemptions fall away or become qualified and subject to a public interest test. FOISA further requires that *substantial* harm be likely to occur if certain information is disclosed, making it more likely that the information will be released.
- The majority of FOISA exemptions that have been applied to SG files which carry extended closures relate to *Personal Information* (s. 38). The others are split between *Relations with the United Kingdom* (s.28); *Prejudice to the Effective Conduct of Public Affairs* (s.30); *Commercial Interests and the Economy* (s.33); *Communications with Her Majesty etc. and Honours* (s.41).
- Should a reduction of the period of an exemption from 30 years be agreed for UK records under the UK FOI Act, then it is important that an equivalent change be made to the status of 'historical' records under FOISA. This would require an equivalent reduction to the revised period of years, and could be achieved by Order under s.59 of that Act.

Public Requests for Information from Files transferred to NAS before 1 Jan 2005

- Under FOISA the public can seek access to information held on any government file which was transmitted to the NAS before 1 Jan 2005.
- NAS acts as a conduit, liaising between the enquirer and the SG departments. The file contents are inspected by government officials to determine whether FOISA exemptions can be shown to apply. Only where these are seen to apply will particular documents be withheld from release, or particular documents redacted by the department concerned.
- In 2005 the NAS responded to access requests for information held on 89 'closed' SG files in its custody. In 2006 access requests to 127 files was sought, and by 2007 the figure had stabilised at a figure of 100 files. On this basis, the NAS does not anticipate that a reduction to FOISA's 'historical' rule period would substantially increase either the number or burden of FOI requests received.

Benefits of the FOISA Request Process

- Effectively the FOISA request process has permitted the earlier opening of files held in NAS which are less than 30 years old. Those documents within a file not subject to exemption will have been released, and many files are made available in their entirety.
- A large number of FOISA requests to view information on SG files held in the NAS have been for files older than 20 years.
- The number of government files which remain 'closed' in NAS is diminishing. Files which were transferred before 1 January 2005, and have not been assessed under FOISA, become 'historical' at the expiry of 30 years. Provided that no exemptions are seen to apply, they attain this status at the turn of each new calendar year. On average about 1,500 such files enter the public domain through this route.

Public Access to Files Transferred after 1 Jan 2005

- As a further consequence of the introduction of FOISA, from 1 January 2005 no government file may be transferred to the NAS without having been previously assessed by government officials to determine whether exemptions apply. Effectively this means that the majority of SG files, many less than 30 years old, enter the public domain at the point of immediate transfer to the NAS and can be viewed without restriction by the public.

- With only exempt files continuing to attract 'closures', the number of closed files will dwindle and eventually disappear. It is estimated that by the year 2030, the NAS will hold very few files that contain closed government information.

Options for Planning and Transition Period: The Keeper's View

- Public use of archives in Scotland, as in the rest of the UK, is increasing and the perceived demand is for freer access to government records and the information they contain. Recent decisions by the Scottish Information Commissioner supported by rulings of the Scottish courts, and submissions by the Scottish Records Advisory Council, have reinforced this view further.
- It is the Keeper's view that the benefits associated with reducing the current period of 'historical' closure under FOISA outweigh the risks. Among the immediate benefits to be realised would be
 - savings in time and resources, both in NAS and SG departments, from the need to assess older records under the FOISA review system. In some cases such inspections can take weeks or months to achieve.
 - improved public confidence in the record keeping system and easier access to information held by government.
 - improvements in government accountability for the information it holds.
- The Keeper would further seek an improved and streamlined approach towards the release of information between Scottish and UK departments, to ensure continuity of response, achieve a reduction in administrative costs and remove needless frustration for applicants.
- The Keeper therefore sides with greater openness, recognising that the speed of change in Government and increase in public expectation, points towards a reduction of any restriction from the existing 30 years. He welcomes the work of the 30 Year Review team and supports the promotion of earlier access to government records and the information they contain.

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